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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

NATHANIAL B.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA
BARBARA COUNTY,

Respondent;

SANTA BARBARA COUNTY CHILD
WELFARE SERVICES,

Real Party in Interest.

2d Civil No. B226096
(Super. Ct. No. 1285797)
(Santa Barbara County)

Nathaniel B. (father) petitions for extraordinary writ relief from the juvenile court's order terminating reunification services as to his daughter N.O. and setting a permanency planning hearing.¹ (Cal. Rules of Court, rules 8.452 & 8.456; Welf. & Inst. Code,² § 366.26.) Father contends the court erred in finding that reasonable services had been provided. He further asserts that the court erred in failing to consider polygraph

¹ The whereabouts of N.O.'s mother throughout the proceedings was unknown. She is not a party to this appeal.

² All further undesignated statutory references are to the Welfare and Institutions Code.

evidence because it was relevant to the determination whether he had made substantial progress on his case plan. We shall deny the petition.

FACTS AND PROCEDURAL HISTORY

The Dependency Petition and Jurisdiction/Disposition Hearing

On January 5, 2009, Santa Barbara County Child Welfare Services (CWS) filed a section 300 petition as to five-year-old N.O. The petition alleged among other things that on December 30, 2008, CWS had received a referral alleging that N.O. was being sexually abused by her step-grandfather, Mark S.³ When N.O. was interviewed by the social worker and a police detective, she said that she takes showers with Mark and that he touches her vagina with his fingers to "clean her." N.O. demonstrated this by spreading her legs open and rubbing her vagina with three fingers. She also referred to "hurting" Mark's penis with her leg and vagina.

The police detective who interviewed N.O. also spoke to a "family friend" named Janae, who stated that N.O. had been staying with her for one to three weeks a month for over two years. Around September 27, 2008, N.O. told Janae that she took a shower with Mark and was scared of him. When Janae informed father of her concerns, he responded that the child was "just evolving" and told her not to worry. In October 2008, N.O. told Janae that Mark bought her gifts and took her to the movies. N.O. also stated that "she couldn't [call 911] because she didn't want Grandpa Mark to go to jail." On another occasion, N.O. told Janae and her daughters "Grandpa Mark wears panties with a hole through which his penis sticks out" and said "the rule is the penis has to be out at night."

In a mental health screening conducted on January 21, 2009, N.O. presented with a flat affect and exhibited no emotional expression or fluctuation, all of which are consistent with dissociation or post traumatic stress disorder (PTSD). N.O. described herself as "bad," "mean," and "lonely." It was recommended that N.O. undergo therapy with a specialist in childhood trauma.

³ Mark S. is father's stepfather. For ease of reference, we shall refer to him as Mark.

In the original jurisdiction and disposition report filed on May 21, 2009, CWS recommended that N.O. be placed in family maintenance. CWS noted: "Originally, it was believed that [N.O.] may also have been sexually abused by her father, . . . however, it appears now that the father showed poor judgment and neglected to supervise her properly, which is evidenced by [N.O.] being left with her [step] grandfather three days a week, in addition to spending two weeks a month with the family's friend Janae. The father has stated that he will supervise and protect [the child] adequately from now on, and is committed to participating in any services needed for her to remain in his custody."

CWS changed its recommendation after the first day of the disposition hearing on May 21, 2009. Father had testified that on December 22, 2008, N.O. told him that "[Grandpa's] penis is yucky." He also testified that he had no further contact with Mark between that date and when CWS contacted him on December 30. Mark, however, said that father left N.O. with him on December 27. N.O. was also exhibiting inappropriate sexual behavior at school, daycare, and her foster home. N.O. told her foster parents she did not like it when people touched her "flower" and said she had a "family secret." When N.O. was interviewed following the first day of the contested hearing, she said she had a secret about her grandfather's "private parts" and circled the penis on a picture of an anatomically correct male. Based on this new information, CWS recommended that N.O. be removed from father's custody and that he be offered reunification services.

At the conclusion of the hearing on June 17, 2009, the court adopted CWS's findings, declared N.O. a dependent, and removed her from the custody of father. The case plan included weekly individual counseling for N.O. to address sexual abuse, PTSD, and parental separation issues. Father was to participate in therapy as recommended by the therapist. Among the objectives were that father learn how to protect N.O. from sexual abuse and "not allow contact with the paternal step-grandfather." Father was also to "attend counseling to address the abuse and inappropriate behavior that his daughter has been exposed to" and thereafter "demonstrate his parenting skills" to CWS.

Interim Review Report and Six-Month Review Hearing

In its interim review report, CWS stated that father had undergone his psychological evaluation on June 30, 2009. During that evaluation, father denied that Mark had acted inappropriately and insisted that N.O. was not telling the truth. Father was diagnosed as suffering from an adjustment disorder with mixed depression. The psychologist noted that father presented with an unusual quality of affect, which raised a concern that significant information had not been disclosed. It was recommended that father participate in therapy with an expert in child sexual abuse.

Father began therapy sessions on July 14, 2009. On September 3, 2009, father's therapist stated that he remained very guarded and had made minimal progress. N.O. was also receiving weekly individual therapy. The social worker reported that the child was acting out in her foster care placement by throwing things, kicking walls, and hitting the foster parents.

At the six-month review hearing on December 14, 2009, CWS recommended an additional six months of services. Father was making progress and had participated in 27 parenting sessions and received therapy. During supervised visits, he was observed to have improved his parenting skills. The case plan called for two unsupervised visits a week, and added the objective that father participate in family therapy with N.O. Father was expected to continue improving his ability to identify and respond to N.O.'s emotional needs. N.O.'s behavior had significantly improved, and she was learning to manage her emotions.

Father told the social worker that he now realized he had missed warning signs of sexual abuse and should have followed up on N.O.'s statements about Mark's penis. Father also informed the social worker that he would not allow N.O. to have any contact with Mark. When asked why, father responded, "because CWS told [me] not to." The social worker was concerned that father did not fully understand the extent of the harm that N.O. had suffered at the hands of Mark and would allow him to have contact with the child.

18-Month Review Hearing

At the 18-month review hearing⁴ commencing on July 20, 2010, CWS recommended that reunification services be terminated and that the matter be set for a permanency planning hearing. Although father had stated he would not allow any contact between N.O. and Mark, he had delivered a pair of ballet slippers Mark had given the child as a gift. When asked about this, he became defensive and said he was not aware that gifts were a problem. He denied passing the ballet slippers on to N.O., and revealed that Mark had been sending her gifts ever since she was removed from father's custody. Father claimed the gifts were delivered to the child by her grandmother who continued to have a friendly relationship with Mark, her ex-husband. Father stated he understood that child molesters often "groom" their victims by giving them gifts, but did not believe that Mark's gifts were offered for that purpose. He did not believe the gifts were inappropriate, and blamed the social worker for failing to tell him otherwise. Father believed that N.O. had been molested while visiting Janae, and thought it was unfair that Janae was allowed visits with N.O. while Mark was not.

The social worker testified that father had not made substantial progress with his case plan in that he continued to believe N.O. was not molested by Mark and continued to allow Mark to have contact with the child by giving her gifts. When the social worker observed a two-hour visit between father and N.O. at a park, father was unable to set boundaries and tell N.O. it was not acceptable to hit another child in the face or take another person's place in line. Father also refused to take any responsibility for N.O.'s behavior, and believed she was only acting out because she had been removed from his care.

During a team decision-making meeting on May 25, father stated that he would not allow any contact between N.O. and Mark, then asked whether Mark could see

⁴ The case was originally set for a 12-month review hearing on June 28, 2010. (See § 366.21, subd. (f).) By the time the hearing commenced on July 20, father had received more than the maximum 18 months of reunification services. (§ 361.5, subd. (a)(3).) The 12-month review hearing thus became the 18-month review hearing. (§ 366.22; *Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1508.)

her when she turned 18. N.O.'s teacher reported that she usually threw a tantrum when asked to write about her weekend visits with her father. N.O. told the teacher that she either did not remember or "does not have to tell her secrets about the weekend." N.O.'s CASA representative also expressed concern regarding the child's "secrecy and emotional state." N.O.'s behavior had regressed since she completed her treatment with therapeutic behavioral services in April.

Father received regular two-hour supervised visits with N.O. twice a week; a third seven-hour weekend visit was added in February. N.O.'s foster mother reported that father and his mother sometimes arrived separately and that N.O. would leave with her grandmother while father drove away in a different direction. N.O. stated that she sometimes visited her grandmother and her boyfriend alone. When the social worker visited N.O. on June 29, 2010, the child appeared to have been coached about what to say had happened during her visit with her father. When asked if someone had told her what to say, her expression saddened and she said she did not remember.

Based on all the available information, CWS concluded that father had failed to meet the objectives of his case plan. Most significantly, he had failed to show that he would prevent N.O. from being sexually abused in that he refused to accept that Mark had abused her and continued to allow the child to receive gifts from him. CWS also concluded that father had failed to consistently, appropriately, and adequately parent N.O.

Father testified that he would not facilitate any contact between N.O. and Mark if the child was returned to his care. He was unaware that giving gifts could be construed as grooming, and said it would not happen again. He had asked why Janae was allowed visits when Mark was not because he believed both of them exhibited warning signs of sexually abusing N.O. Notwithstanding N.O.'s claims, he was "unaware" of whether she had been sexually abused by Mark because he was not there. Instead, he believed that Janae had coached N.O. to make the allegations.

The Juvenile Court's Ruling

At the conclusion of the hearing, the court adopted CWS's recommended findings, terminated reunification services, and set the matter for a section 366.26 hearing on November 4, 2010. The court found that although CWS had "provided a vast array of services," father had "made minimal progress towards alleviating or mitigating the causes necessitating placement." Regarding father's testimony that he would not allow Mark to have any further contact with N.O., the court concluded that "to some extent he is going through the motions in terms of participating in services, but has not fully been able to accept and understand . . . the danger [Mark] poses towards this child."

The court also noted that father had an "unusual quality of affect" during his testimony and other appearances, which "rais[es] concerns that significant information related to the referral questions wasn't being disclosed." Due to his "chronic behavioral passivity," he continued to refuse to accept the possibility that Mark had in fact abused N.O. and "is still accusing her of lying." Instead of focusing on whether he had met the objectives of his case plan, father "started off the case in this hearing . . . trying to cast doubt on the allegations in the petition, even though that was sustained a long time ago and has been the basis of this whole case." The court further noted that father was living with his mother, who continued to have what she unconvincingly characterized as a "business relationship" with Mark. After summarizing all of the evidence, the court concluded "that after 18 months, [father] still doesn't understand the trauma his daughter underwent and what its effect on her has been long-term, how he has contributed to it, and I just don't believe that sending the child home to [father], living in his mother's home, at this point, is safe."

DISCUSSION

I.

Reasonable Services

Father contends the evidence does not support the court's finding that reasonable services were provided because he was not provided family therapy as stated in the case plan.

In reviewing the sufficiency of evidence to support an order in a dependency proceeding, we view the evidence and draw all reasonable inferences therefrom in favor of the order. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We do not reweigh the evidence, resolve evidentiary conflicts, or evaluate the credibility of witnesses. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) The appellant bears the burden of establishing that a finding or order is not supported by sufficient evidence. (*Ibid.*)

Sufficient clear and convincing evidence supports the juvenile court's finding that father was provided reasonable services. In reaching this conclusion, we are mindful that "[i]n almost all cases it will be true that more services could have been provided more frequently and that the services provided were imperfect." (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547.) "Services will be found reasonable if the Department has 'identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained reasonable contact with the parents during the course of the service plan, and made reasonable efforts to assist the parents in areas where compliance proved difficult (such as helping to provide transportation . . .).' [Citation.]" (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 972-973.)

Here, the primary concern was that father was either unable or unwilling to protect his young daughter from sexual abuse at the hands of her step-grandfather. The services offered, including extensive therapy and parenting classes, were plainly directed at rectifying this concern. Moreover, there is no evidence that CWS either failed to communicate with father or failed to make reasonable efforts to assist him. While father correctly notes the case plan expected him to participate in family therapy and his failure to do so was through no fault of his own,⁵ he fails to explain why the services that were actually offered were insufficient to address the problem. Although he asserts that family

⁵ In reporting that father and N.O. had not participated in family therapy, CWS noted: "Children's mental health services indicate that they are only able to provide family therapy to the child's current care takers. Children's Mental health clinic would be able to provide family therapy to the father and the child only if and when the child is returned to the father's care."

therapy "was in fact key to a successful plan for reunification," he fails to persuade us that this is so. Father was provided at least 40 parenting classes and participated in extensive individual therapy following a psychological evaluation. He also had the opportunity to interact with his daughter during regular supervised visits. The social worker also gave him books to read that were relevant to the issues at hand, and met with him to discuss the specifics of his case plan. From the outset, the primary objectives of his plan were clear: To fully comprehend that his five-year-old daughter had been molested by her step-grandfather; to achieve an understanding as to how his lack of parenting skills allowed that to happen; and to obtain the skills necessary to protect the child from further harm. The court did not err in finding that father had been provided sufficient services to achieve all of these goals.⁶

II.

Polygraph Evidence

At the 18-month review hearing, father sought to introduce evidence that Mark had passed a polygraph examination with regard to N.O.'s allegations of sexual abuse. Father offered the evidence as relevant to his state of mind. In his petition, father expands on this by adding that he "sought to explain why the department's insistence that [father] adopt their position that [Mark] was proven guilty was unreasonable under the circumstances, and therefore he would not be able to sufficiently please the CWS worker so as to receive Family Maintenance." The court excluded the evidence on the ground that "polygraph evidence, generally, is not admissible for any purpose, even with a showing of mind state [*sic*], unless you have a citation to the contrary." The court added "to some degree, we're begging the question of whether [Mark] engaged in the behavior

⁶ Father also notes that the court had discretion to extend services beyond the 18-month review period. The court's discretion in this regard is limited to cases in which reasonable services were not provided during the initial 18-month period (see, e.g., *In re Daniel G.* (1994) 25 Cal.App.4th 1205, 1212-1213), or other "rare" cases where "extraordinary circumstances" were present that warranted an extension of services (see, e.g., *Cresse S. v. Superior Court* (1996) 50 Cal.App.4th 947, 954; *Andrea v. Superior Court* (1998) 64 Cal.App.4th 1377, 1388). The court here did not abuse its discretion in declining to extend services on either ground.

that you claim is alleged." Father contends this ruling was in error. We conclude the evidence was properly excluded.

Polygraph evidence is inadmissible for any purpose in criminal or juvenile delinquency proceedings. (Evid. Code, § 351.1.) Although there is no statutory provision addressing the admissibility of polygraph evidence in juvenile dependency proceedings, a party seeking to introduce such evidence must establish a foundation for its admissibility in accordance with Evidence Code section 402. (*In re Kathleen W.* (1987) 190 Cal.App.3d 68, 71-72.) Here, father did not seek a foundational hearing on the polygraph results he offered for admission. Although father contends the evidence was not offered for the truth of the matter asserted but rather to show his state of mind, the court recognized that this theory of admissibility still "begged the question" whether N.O.'s allegations of sexual abuse were true.

Moreover, the evidence was irrelevant. The section 300 petition alleged that N.O. had been sexually abused by Mark, and the court found that allegation true at the conclusion of the disposition hearing held on May 21, 2009. Father did not appeal that finding, and the court's decision is final. (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811.) Even if the evidence had been admitted, it would not have altered the result. On the contrary, father's reliance on the polygraph evidence merely reinforced the conclusion that he could not be trusted to protect N.O. from sexual abuse by Mark.

The petition for extraordinary writ relief is denied.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

James E. Herman, Judge
Superior Court County of Santa Barbara

Biely & Biely, Suzanne K. Biely and Christopher S. Biely for Petitioner.

No appearance for Respondent.

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